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In the Supreme Court

of the United States

OCTOBER TERM, 1963

No. 841

HOISTING & PORTABLE ENGINEERS, LOCAL UNION NO. 701, of the International Union of Operating Engineers, P. R. "RED" WAGES, CARL REAMS and HERBERT SCHELL,

Petitioners,

v.

CHARLES E. GILBERT, J. L. SALEEN, GEORGE H. GRAVATT, HYRUM COX, F. W. MOORMAN and DEAN STEELMAN, for themselves and on behalf of all of the members of HOISTING & PORTABLE ENGINEERS, LOCAL 701,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

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Hoisting & Portable Engineers, Local Union No. 701, I.U.O.E., P. R. Wages, Carl Reams and Herbert Schell, respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Oregon entered in the above case on July 31, 1963.

OPINIONS BELOW

The opinion of the Court below (Appendix A, *infra*, pp. A1 thru A8) is not yet officially printed in the Oregon Reports. It is reported in 384 P2d 136.

Three Memorandum Opinions of the Circuit Court of Oregon for Multnomah County (the trial Court) are unreported, but are reproduced in printed form in Appellants' Abstract of Record, which has been certified as part of the record in this Honorable Court.[1] An Opinion denying a motion to strike the Complaint appears at pages 8-10; an Opinion overruling a demurrer to the Complaint appears at pages 16 and 17; and an Opinion on the merits after trial appears at pages 26-35.

JURISDICTION

The judgment of the Supreme Court of Oregon was entered on July 31, 1963. A timely petition for rehearing was filed and was denied, without opinion, on September 17, 1963. On December 11, 1963, Mr. Justice Douglas made an Order herein providing in pertinent part:

> "the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including Feb. 14----1964."

Petitioners seek to obtain their rights, privileges and

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[1] RULE 16 of the rules of the Supreme Court of Oregon provides in part: . . . "A copy of the circuit court's opinion may be printed in the abstract." (222 Or. [13]). Nine additional copies of the printed Abstract of Record are being filed with this Petition so as to present these trial court Memorandum Opinions in conformity with Rule 23 (i) of this Court.

immunities set up and claimed under the Constitution and statutes of the United States, drawn into question before the state courts, and, as petitioners contend, denied to them in the state courts.

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

1. Are state courts obligated to observe the procedural and substantive provisions of Section 501 (a) and (b) of the Labor Management Reporting and Disclosure Act (29 U.S.C. 501 (a) and (b)) in passing upon a cause of action based upon alleged breach of fiduciary duties and responsibilities by officers of a labor organization whose activities affect commerce within the meaning of the Act?

2. Could the state courts of Oregon constitutionally exercise powers of visitation over a labor organization whose activities affect commerce, where there was no proof of violation of existing law, federal or state, simply to satisfy those courts' ideas of what was proper trade union democracy?

3. Does the Fourteenth Amendment to the Constitution as it adopts and makes applicable to the states the guarantees of the First Amendment, prohibit state courts from enforcing their judgment concerning the proper conduct of those affairs offends any applicable statute or the internal laws of the organization?

4. May a state appellate court of final jurisdiction

affirm a state trial court's determination of fundamental issues upon a theory not expressed in the pleadings, expressly disavowed in the trial court, which alters the fundamental basis of the case, consonant with the Due Process Clause of the Fourteenth Amendment of the Constitution?

5. Is it violative of the Due Process Clause of the Fourteenth Amendment to the Constitution for a state court of final jurisdiction to ground its decision upon a theory not expressed or tried in the lower court and not supported by the record presented to the state appellate court?

STATEMENT OF THE CASE

Petitioners here are defendants below. Local Union 701 of the International Union of Operating Engineers, AFL-CIO, is the principal petitioner. Joined with Local 701 are three individual officers of that organization. The original complaint they were called upon to meet called for their removal from office, for a receivership and accounting; for restitution, and for other miscellaneous relief. Plaintiffs, respondents here, were members of Local 701 who sued on their own behalf and for all other similarly situated members of Local 701. (Abstract of Record, pp. 1-6; 21-22; and 26).[2]

Appeal was taken to the Supreme Court of Oregon, the highest state tribunal to which appeal might be made.

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[2] Nine additional copies of the Abstract of Record have been provided. References thereto throughout this petition will hereafter be noted by "Ab. ."

from certain portions of the trial court's determination, namely:

(a) visitorial audits quarterly for a period of one year;

(b) general retention of jurisdiction over any complaints that might be made concerning alleged failure to comply with the internal laws of the organization; and

(c) Allowance to plaintiffs' attorneys of a fee of $8500.00.[3]

The case primarily involved alleged failure of local union officials to observe their fiduciary responsibilities (Ab. 8-10). From these charges they were exculpated (Ab. 26-35).

Nevertheless, the trial court thought it followed that the counsel for the plaintiffs should be allowed an attorneys' fee of $8500.00. The trial court also believed that undefined "democratic processes" would better be insured if it retained jurisdiction, provided for supervision of four quarterly audits, and arranged its own "observers" for a pending election for local union offices.

How The Federal Questions Arose

Initially the complaint was attacked by Motion to Strike, for including several causes of suit not separately stated (Ab. 6-8). In argument thereon it was contended that every allegation was evidentiary of the primary cause of complaint, alleged misappropriation and misapplication of funds and failure to account (Ab. 8-10).

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[3] Another item appealed from was reversed by the Supreme Court of Oregon (page A 8 of this Petition).

Upon this theory defendants, petitioners here, demurred, asserting that the complaint had not been filed with leave of court, and that there were no allegations that Local 701 or its officers had not, on the face of the complaint, been complained to and had failed or refused within a reasonable time to take appropriate steps to obtain restitution and an accounting (Ab. 10-16). The demurrer was overruled (Ab. 17-18).

Following trial the findings of the court were expressed in a Memorandum Opinion (Ab. 26-35). No breach of fiduciary duties and responsibilities, within the meaning of Section 501 (a) of the LMRDA, was found. No "recovery" was allowed.

Notwithstanding these findings counsel fees in a substantial sum were allowed plaintiffs; court named CPA's were to participate in four quarterly audits; and jurisdiction was retained so as to make the court available as a visatorial monitor in case of some as yet unknown and unexpected violation of the organization's own internal laws.

In the trial court the federal questions involved were raised by defendants' demurrer (Ab. 10-16); and by their Motions to Dismiss made after plaintiffs rested their case in chief (Tr. 407; 409-410).[4] The basic federal issue involving the applicability of Section 501 (b) of the LMRDA was also presented to the trial court on proceedings concerning allowance of attorneys' fees to plaintiffs after trial (Ab. 63, 64).

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[4] The reference "Tr." is to the court reporter's Transcript of Proceedings which has been certified as part of the record herein.

These questions were raised by your petitioners in their appeal to the Supreme Court of Oregon (See the entire Combined Abstract of Record and Brief, filed by these petitioners, then "defendants-appellants").

The opinion of the Supreme Court of Oregon opened additional federal questions concerning "due process." It grounded its affirmance of the trial court upon the theory that the trial court had a right to protect plaintiffs as to a fair forthcoming election (See page A3 of this Petition). This issue was neither presented by the pleadings or otherwise to the trial court (Ab. 33). The Supreme Court of Oregon also based its affirmance upon allegations which were not found to be true by the trial court and which were not substantiated by the evidence.

These new issues were presented, following receipt of its Opinion, in a Petition for Rehearing to the Supreme Court of Oregon, which is included in the record certified to this Court. The Petition for Rehearing was denied, without opinion, on September 17, 1963.

REASONS FOR GRANTING THE WRIT

The opinion of the Supreme Court of Oregon is, so far as we are aware, the first state court reported decision passing upon the issues whether or not a state court must observe Section 501 (b) of the LMRDA, despite the general language of Section 603 (a) of that Act. These issues are quite likely to arise in a variety of situations in the several states and it is of public importance that this Court give guidance in a troublesome and difficult area.

In Section 501 (b) Congress went to detailed draftsmanship to outline procedures for both state and federal courts. It is arguable that in Section 603 (a) the Congress threw these detailed and carefully fashioned procedures to the far winds. This could not have been the reasoned intention of the Congress.

A primary purpose of the LMRDA was reasonable uniformity of fiduciary standards to be exacted of labor union officials. The statute (29 U.S.C. 501 (a)) is stringent, yet takes account of the special and difficult problems which may be involved in the handling of trade union funds and property. Uniformity and certainty of remedy were equally important to the Congress.

This Court must inquire whether the Congress truly meant, by the general and loose language of Section 603 (a) to permit 50 varieties of remedies for breach of labor union officials' fiduciary duties and responsibilities. In the inquiry this Court cannot ignore the basic fact that the Congress itself carefully outlined and defined the remedy available in both state and federal courts for such breach.

It is submitted that the Congressional intention was that the careful particulars contained in Section 501 (b), should prevail over the sweeping and undiscriminating generalities contained in Section 603 (a).

The additional issues, concerning deprivation of due process, turn upon the handling of this case in the trial court and, particularly, in the Supreme Court of Ore-

gon. (See Appellants' Brief, Reply Brief, and, particularly, their Petition for Rehearing.)

CONCLUSION

It is submitted that this case should be reviewed and reversed for failure of the Oregon courts to consider and apply Section 501(b) of the LMRDA. It is also submitted that the Oregon courts failed to accord to petitioners "due process of law" in the particulars stated.

Respectfully submitted,

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APPENDIX A

No. 7411—July 31, 1963

IN THE SUPREME COURT OF THE STATE OF OREGON

IN BANC

GILBERT ET AL, *Respondents*, *v.* HOISTING & PORTABLE ENGINEERS, LOCAL UNION No. 701, *Appellants*.

Appeal from Circuit Court, Multnomah County.

JAMES W. CRAWFORD, Judge.

Argued and submitted July 1, 1963.

Clifford D. O'Brien, Portland, argued the cause for appellants. On the briefs were O'Brien & Perkins.

Gunther Krause, Portland, argued the cause for respondents. On the brief were Krause, Lindsay & Nahstoll.

Before MCALLISTER, Chief Justice, and ROSSMAN, PERRY, SLOAN, O'CONNELL, GOODWIN and DENECKE, Justices.

AFFIRMED AS MODIFIED.

O'CONNELL, J.

This is a suit in equity brought against the Hoisting & Portable Engineers Local 701 by plaintiffs as representatives of all the members of the local union. Plaintiffs pray for the appointment of a receiver, for an accounting, and for other incidental relief.

The gravamen of the complaint is that four of the officers of the local union had failed to follow "democratic processes" in the conduct of the affairs of the union in various particulars. It is charged that these officers were elected as a result of a fraudulent elec-

tion in which they caused invalid ballots to be cast and that the officers, for the purpose of appropriating union property for unauthorized purposes, have refused to provide for the election of trustees and auditors as required by the bylaws of the union.

The trial court found that plaintiffs had failed to sustain their charge of fraudulent election, or that there had been a misappropriation of funds justifying the appointment of a receiver. However, the court found that defendants, in conducting the affairs of the union, had disregarded the union constitution in certain respects affecting democratic processes.[1] Although the trial judge found that there was not sufficient evidence to justify removal of the defendant officers, he considered their previous neglect in observing the democratic processes of the union a ground for setting up safeguards in the conduct of the next

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[1] The trial judge's memorandum opinion contains the following statement:

"3. *As to Abolition of Democratic Processes.* This challenge to defendants' conduct of Local 701, its members' meetings, controls, failure to follow constitutional directives, as evidenced by absence of auditors, trustee *appointments*, inability of members to secure requested information regarding funds, elections, etc., constitute the more serious criticism of defendants' operations."

The court continued:

"4. * * *, we now address ourselves to the '*Democratic processes*' phase of charge and inquiry. As stated above, I am of the opinion defendants have in certain respects disregarded the constitution. Conduct of meetings (however, only one or two were testified to) has been criticized, and some evidence suggests unlawful means employed when observance of the by-laws would have accomplished the same result. The Financial Secretary and Business Manager, P. R. Wages, has laid himself open to charges of 'Cronyism' and suspicion of selection of officials and committeemen who might be inclined toward Wages' policies and therefore lacking in independence. Generally, it would seem, however, these men have discharged their responsibilities adequately; the situation, however, should

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union election which was soon to be held. To this end the following order was entered:

"5. For the purpose of participating in supervising the election of officers and officials of the defendant Local 701 in June 1962, the certified public accountant firm of Pattullo and Gleason be and it hereby is appointed by the Court with instructions to report the conduct and results of the election to the Court.

"6. For the purpose of advising the Court as to the assets, income and expenses of the defendant Local 701 the certified public accountant firm of Pattullo and Gleason be and it hereby is appointed to check the quarterly audits of the business of said defendant and to report thereon to the Court each quarter from date hereof not to exceed one year.

"7. Jurisdiction over this suit is hereby retained by this Court so that any party may bring before the Court any matters within the issues and particularly any failure to comply with the Constitution of the International and the Bylaws of defendant Local 701 and any failure to accord to the membership their rights under the law and the said constitution and bylaws. Either party may move to terminate said jurisdiction at any time."[2]

(Continued from page 1278)

never have been permitted to develop when by reason of the manner and method of their selection, their actions might be 'suspect.' What judicial action is suggested in view of the fact in June, 1962, the members will participate in an election which may well resolve at least the most important issues? No serious contention is made that the up-coming election is 'rigged', no such issue appears in the pleadings nor has it developed on the trial, other than suggestion of continuance of 'Cronyism.' Contests appear on the ballot for major offices."

[2] The trial court's memorandum opinion relating to this matter was as follows:

"5. * * * *Let the election take its course.*

"6. And in this connection, I have one suggestion which I feel will promote confidence and accuracy. That is this: De-

(Continued on page 1280)

Assuming that there was evidence to support the charge of an abuse of democratic processes in conducting the affairs of the union relating to election of officers, the relief granted was within the power of a court of equity.[3] As we read the record, there was evidence to establish that the defendants failed to observe the union bylaws and constitution relating to the election of trustees and auditors. There also was evidence of irregularities in previous election procedures. This evidence was sufficient to support the order designed to protect the plaintiffs' right to have a fair election.

However, it is contended that even assuming such evidence was produced, plaintiffs have failed to comply with Section 501 (b) of the Labor-Management Reporting and Disclosure Act of 1959, 29 USC § 501 (b), requiring a union member who seeks relief against his union to first request the governing board or officers to sue or secure the appropriate relief and to obtain leave of court before bringing such proceeding.[4]

(Continued from page 1279)

fendants propose an election supervised by CPA's. While there is no indication before me that either of the two CPA's who testified is other than honorable and qualified, I would like to see *David Pattullo*, or Myron Gleason Attorney and CPA designated as one of those appointed to supervise the approaching election, reporting to the Court. Also Mr. Pattullo or Mr. Gleason to participate in qtly audits for period of one year."

[3] It is recognized that a court of equity may provide the necessary safeguards to assure a fair union election. See for example, Sibilia v. Western Electric Employees Ass'n., 142 NJ Eq 77, 59 A2d 251 (1948); O'Neill v. United Ass'n of Journeymen Plumbers, Etc., 348 Pa 531, 36 A2d 325 (1944).

[4] Section 501 (b) of the Labor-Management Reporting and Disclosure Act of 1959 (29 USC § 501 b) provides as follows:

"(b) When any officer, agent, shop steward, or repre-

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The trial court concluded that the procedure specified in Section 501 (b) was not intended to be binding upon union members bringing actions in courts of a state where there already existed procedures by which a union member could enforce the fiduciary duties of union officers. We agree with this interpretation of the act. Section 501 (b) could be interpreted to mean that the procedure there specified must be followed in state court proceedings. But Section 603 (a) of the Labor-Management Reporting and Disclosure Act of 1959 indicates the congressional intent to recognize the remedies available in state courts unaffected by the remedies under the federal act unless "explicitly provided to the contrary."

(Continued from page 1280)

sentative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation."

Section 603 (a) of the Labor-Management Reporting and Disclosure Act of 1959 (29 USC § 523 a) provides as follows:

"Except as explicitly provided to the contrary, nothing in this chapter shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization, or of any trust in which a labor organization is interested, under any other Federal law

(Continued on page 1282)

It is not necessary under Oregon law to obtain leave to sue under the circumstances recited in Section 501 (b). Although it is necessary for a complaining union member to exhaust his remedies within the union itself as a condition precedent to judicial relief,[6] the facts in the present case indicate such procedure would have been fruitless.[7] Plaintiffs could not expect relief through a request made to the officer of the local union whose conduct was being challenged. And, although plaintiffs brought the alleged unlawful activities of the defendant officers to the attention of the International Union of Operating Engineers, the International took no action.

We are of the opinion that the controversy was ripe for consideration by the trial court.

Defendants' attack upon the court's jurisdiction is made, not because they object to the judicial supervision of the election but because the court allowed plaintiffs' attorneys fees ($8,500) and reimbursed plaintiffs' counsel for the cost of duplicating and distributing to the union membership copies of the court's memorandum opinion ($222).

Defendants object to the allowance of attorneys' fees, first upon the ground that there is no authorization in the Oregon statutes for the allowance of at-

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or under the laws of any State; and, except as explicitly provided to the contrary, nothing in this chapter shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or law of any State."

See also Wollett: Fiduciary Problems Under Landrum-Griffin, 13 NYU 13th Annual Conference on Labor 267 (1960).

[6] Fox v. Knight, 221 Or 1, 350 P2d 177, 179 (1960); Way v. Patton, 195 Or 36, 45, 241 P2d 895 (1952).

[7] See Mursener v. Forte, 186 Or 253 at 272, 273, 205 P2d 568 (1949).

torneys fees under the circumstances of this case; and secondly because Section 501 (b) limits the allowance of attorneys' fees to cases where there is the "recovery" of money. Having interpreted Section 501 (b) as merely supplemental to state remedies, it follows that we would not be bound by any limitation which that section imposes upon the allowance of attorneys' fees.

Although defendants' first ground of objection presents a more serious question, we are of the opinion that the allowance of attorneys' fees was proper in this case. The authority of a court of equity to award attorneys' fees is not derived solely from the statutes. Equity may under some circumstances as a part of its inherent equitable powers award attorneys' fees. This power is frequently exercised where the plaintiff brings a representative suit on behalf of other members of an organization, as for example where a stockholder brings a derivative suit against a corporation.

Defendants contend, however, that attorneys' fees are allowed in such cases only if the prosecution of the suit results in a pecuniary benefit. Although there is authority supporting defendants' contention, more recent cases have permitted recovery where there was a non-pecuniary benefit to the corporation. We be-

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The part of Section 501 (b) referred to reads as follows:

"* * * The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization * * *"

Treves v. Servel, Inc., 154 A2d 188 (Del Sup Ct. 1959); Saks v. Gamble, 154 A2d 767 (Del Ch 1958); Aaron v. Parsons, 139 A2d 365 (Del Ch 1958), affirmed 144 A2d 155 (Del Sup Ct 1958); Yap v. Wah Yen Ki Tuk et al., 43 Hawaii 37, 42 (1958); Bosch v Meeker Co-op. Light & Power Ass'n., 257 Minn 362, 101 NW2d 423 (1960); Eisenberg v. Central Zone Property Corp., 1 App

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lieve that these recent cases announce the sounder rule.[10] The broader rule is particularly apposite in suits brought by members of a union to correct evils in union management. The preservation of the democratic process in the functioning of unions is a matter of primary concern, not only to union members but to the public as well. Litigation which results in correcting abuses of this process frequently may not give rise to an ascertainable pecuniary benefit. But the fact that no money or property is involved does not detract from the importance of the litigation. Those members of the union who in good faith seek to preserve the internal democracy of their union should not have to bear the expense of a successful suit. We hold that plaintiffs were entitled to attorneys' fees. The fee allowed by the trial court was reasonable.

The trial court allowed plaintiffs $222 which was the cost of reproducing and distributing to the union membership 4800 copies of the court's order. This is not an item of disbursement within ORS 20.020. However, under proper circumstances a court of equity would have the power to order the defendants to duplicate and distribute copies of the court's opinion or to pay the cost of doing so. But we are unable to find anything in the record other than the statement of

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Div2d 353, 149 NYS2d 840 (1956), affirmed 3 NY2d 729, 163 NYS2d 968, 143 NE2d 516, cert. denied, 355 US 884, 78 S Ct 151, 2 L Ed2d 113 (1957); Martin Foundation, Inc. v. Phillips-Jones Corp., 283 App Div 729, 127 NYS2d 649, affirmed, 306 NY 972 120 NE2d 230 (1954); Long Park, Inc. v. Trenton-New Brunswick Theatres Co., 299 NY 718, 87 NE2d 126 (1949).

[10] It has been suggested that the rule should be stated even more broadly, permitting recovery of attorneys fees even in the absence of benefit if the public interest is served by bringing the suit. Cf., Note, 13 Stan L Rev 146 (1960); 45 Minn L Rev 164 (1960); Note, 48 Calif L Rev 843 (1960).

plaintiffs' counsel explaining why this cost was imposed upon defendants. Therefore it is disallowed.

The decree of the lower court, as modified by the disallowance of the sum of $222, is affirmed.